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No. 81-2135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNIROYAL, INC.,
Petitioner,

v.

ALTA CHRAPLIWY, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 706(k) of Title VII of the Civil Rights Act of 1964 authorizes the award of attorney's fees to prevailing plaintiffs for successful litigation activities undertaken pursuant to plaintiffs' responsibilities as representatives of the class to obtain relief in the Title VII case where the award is sought.

2. Whether, under the circumstances of this case, the court of appeals was required to remand the case to the district court for further findings of the reasonableness of counsel's normal billing rates.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT

On November 28, 1972, Alta Chrapliwy and twenty-five other named plaintiffs [1] filed a class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, on behalf of all female workers employed at Uniroyal's plastic products plant in Mishawaka, Indiana. Defendant Uniroyal immediately retained a talented and highly-paid defense team of lawyers from New York and Chicago and from South Bend, Indiana,

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[1] In addition to plaintiff Chrapliwy, the named plaintiffs are Joan Brugh, Valerie C. Cruff, Margie L. Calmer, Ruby Creasy, Katherine Van Lake Blasko, Genevieve Browning, Genevieve Stachowicz, Harriet Watkins, Wanda Fry, Naomi D. Werner, Mable Richey, Lynda Brown, Betty Rader, Betty C. Fye, Lora M. Riggle, Mary Jacobs, Anna Ray, Derna J. Sowell, Pearl Carver, Margarete G. Bloss, Pansy V. Ellis, Betty J. Covington, Ivajean R. Strock, Dorothy M. Smith, and Betty Young.

where the district court sat. The company fought tenaciously over the next seven years, and ultimately succumbed and settled this litigation in 1979 only when plaintiffs' efforts to have it debarred from its lucrative federal contracts proved successful.[2]

As the district court stated, "No ground was surrendered without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement." *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 460 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982). (Appendix at B-36, *see also* App. B-17)[3] The record below confirms the district court's observation. Over the course of this extended litigation the district court issued ten published decisions.[4] Related litigation in the Northern District

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[2] The term "debarment" refers to cancellation of existing federal contracts and the declaration of ineligibility to obtain future federal contracts pursuant to Executive Order 11246 and related federal regulations, which prohibit employment discrimination based on race, color, religion, sex, or national origin by those who contract with the federal government, and which impose affirmative obligations on federal contractors to ensure that their employees are not subjected to discrimination. The Secretary of Labor and the Director of the Office of Federal Contract Compliance Programs are responsible for the issuance and enforcement of regulations under the Order. *See generally*, 41 C.F.R. Ch. 60 (1981).

[3] The decisions of the district court in Chrapliwy v. Uniroyal, Inc., 509 F.Supp. 442 (N.D. Inc. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), and the court of appeals in Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), will be cited as they appear in the Appendices to the Petition for Writ of Certiorari.

[4] The reported decisions in this case, each of which is styled Chrapliwy v. Uniroyal, Inc., can be found at 5 FEP Cases 806 (N.D. Ind. 1973); 5 FEP Cases 808 (N.D. Ind. 1973); 5 FEP Cases 949 (N.D. Ind. 1973); 6 FEP Cases 98 (N.D. Ind. 1973); 7 FEP Cases 343 (N.D. Ind. 1974); 12 FEP Cases 1657 (N.D. Ind. 1976); 12 FEP Cases 1661 (N.D. Ind. 1976); 71 F.R.D. 461 (N.D. Ind. 1976); 458 F.Supp. 252 (N.D. Ind. 1977); and 15 FEP Cases 822 (N.D. Ind. 1977).

of Indiana, the Seventh Circuit, the United States District Court and Court of Appeals for the District of Columbia, and the Department of Labor resulted in three additional published decisions.[5]

The settlement agreement required Uniroyal to pay the 526 members of the plaintiff class cash and pension benefits totalling $9,318,000, to reinstate 296 terminated class members to active employment with full seniority, and to change the employment system at the Mishawaka plant to improve job opportunities for all female workers. (App. B-1) To obtain that relief plaintiffs' attorneys worked a total of 11,743 hours.

Settlement of the merits of the Title VII case left only the award of reasonable attorney's fees pursuant to Section 706(k), 42 U.S.C. § 2000e-5(k).[6] This led to a new round of litigation in which both sides conducted discovery and made extensive factual and legal arguments to the district court. In March 1981, the district court awarded plaintiffs' counsel $583,679 to compensate for the time spent in this case, and an additional $250,000 in recognition of the quality of counsel's representation, the risks inherent in undertaking the representation on a contingent basis, and the results obtained. That decision was appealed by both parties, giving rise to the decision presented for review.

The district court's decision reflected two rulings on questions of law that were reversed on appeal. First, although the district court had found that plaintiffs'

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[5] Uniroyal, Inc. v. Marshall, 579 F.2d 1060 (7th Cir. 1978); Uniroyal, Inc. v. Marshall, 482 F.Supp. 364 (D.D.C. 1979); OFCCP v. Uniroyal, Inc., 20 FEP Cases 419 (U.S. Dept. of Labor 1979).

[6] Section 706(k), 42 U.S.C. § 2000e-5(k), provides in pertinent part:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

actions in seeking Uniroyal's debarment "were not unreasonable or undesirable," (App. B-20) and that these debarment proceedings had forced Uniroyal to settle the Title VII case (App. B-17, B-35-36; *see also* App. A-5, A-11-A-12)[7] the court nonetheless concluded that the language of Section 706(k) and this Court's decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), "circumscribe the district court's ability to award payment for these hours." (App. B-20) Additionally, though the district court had found that the normal hourly billing rates of prevailing plaintiffs' counsel were reasonable and comparable to defense counsel's rates (App. B-27; *see also* A-6, A-13-15) it ruled that plaintiffs' attorneys' rates must be reduced to "balance" them against lower local rates. (App. B-28) The district court then cut the normal hourly rates of all plaintiffs' attorneys, local as well as out-of-town, and based its fee award on the reduced rates. (App. B-33)

The United States Court of Appeals for the Seventh Circuit reversed on both issues. The Seventh Circuit held that the district court erred as a matter of law in concluding that Section 706(k) or this Court's decision in *Carey* limited its ability to award attorney's fees for plaintiffs' efforts to obtain Uniroyal's debarment as a federal contractor, which both the district court and court of appeals found to have been the decisive factor in forcing Uniroyal to settle the Title VII case. The court of appeals also held that the district court erred as a matter

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[7] The district court also recognized that plaintiffs' persistent efforts had prompted responsible agencies of the federal government to establish mechanisms for the proper enforcement of Executive Order 11246 in future cases:

> "The court is aware that in this case the government agencies responsible for enforcing the Executive Order were slow in performing their statutory function. While they may perform more satisfactorily in the future, that is arguably a result of this litigation. As a product of the plaintiffs' determined prodding, a new OFCCP staff has been established to enforce Executive Order 11246 . . . ." (App. B-19)

of law in determining that it was required to balance the rates customarily charged by plaintiffs' counsel against rates charged by members of the local bar in the community where the district court sits in determining the "reasonable" attorney's fee under Section 706(k). The court thus concluded that the prevailing Title VII plaintiffs were entitled to an award of fees at rates corresponding to counsel's customary billing rates, and it remanded the case to the district court with instructions to award fees on that basis.

SUMMARY OF ARGUMENT

The decision of the court of appeals is correct and does not merit this Court's review. Petitioner points to no real conflict among the courts of appeal on the legal issues decided by the Seventh Circuit. Moreover, the issues presented for this Court's consideration have little significance beyond this case. The decision below rests on a unique set of facts not likely to recur, and it properly recognizes broad discretion in the district courts to scrutinize attorney's fee awards carefully in future cases. Certiorari therefore should be denied, and this ten year litigation should be allowed to draw to a close.

ARGUMENT

A. The Court of Appeals Correctly Reversed the District Court's Decision That It Was Prohibited as a Matter Of Law from Compensating Plaintiffs' Attorneys for Their Work in Forcing Settlement of the Title VII Case by Causing Uniroyal's Debarment as a Federal Contractor.

Although recognizing that plaintiffs' efforts to have Uniroyal debarred as a federal contractor forced the company to settle this Title VII case, the district court denied plaintiffs any compensation whatsoever for 2,348 hours of work leading to that result, reasoning that Section 706(k) prohibits compensation for all work that is not expressly "mandated" by Title VII or its required procedures. (App. B-17-18) The court of appeals reversed, holding that Title VII does not preclude an award of fees for plaintiffs' work under the circumstances of this case. This decision is clearly correct and does not warrant review.

Uniroyal attacks the court of appeals' decision principally by attempting to reargue factual assertions that were rejected by the Seventh Circuit after its careful review of the district court's findings. The company seeks to characterize the proceedings leading to Uniroyal's debarment and the successful settlement of the Title VII case as "independent non-Title VII proceedings" and "collateral actions" resulting from plaintiffs' abandonment of the Title VII case. (Petn. at 10-11) These characterizations are patently false, as the Seventh Circuit found.

In obtaining Uniroyal's debarment, plaintiffs asserted Title VII rights on behalf of the plaintiff class and sought Title VII relief. As the Seventh Circuit explained:

> The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were

> designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action. (App. A-12)

(*See also* App. A-5—The debarment effort "involved issues that were identical to the basic issues in the Title VII action itself.") The court of appeals further noted that plaintiffs' resort to the debarment remedy was a necessary and appropriate response to the delays in the Title VII litigation resulting from the death of the district judge to whom the case was assigned and Uniroyal's obvious intention to take full advantage of that delay to postpone the relief to which the Title VII class was entitled.[8]

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[8] When plaintiffs initiated actions to compel the federal government to enforce Executive Order 11246 so as to force settlement of the Title VII action, the litigation in the district court had been underway for more than two years and was languishing. Plaintiffs had won a partial summary judgment establishing Uniroyal's basic liability for violations of Title VII and had completed discovery and filed a motion for summary judgment on the remaining liability issues, which was pending when the district judge died. (App. B-3) When plaintiffs' counsel requested the assignment of a new judge so the case could be expedited in accordance with the mandate of Title VII, *see* 42 U.S.C. § 2000e-5(f)(5), they were advised by the Chief Judge that docket congestion and the judicial shortage might cause an indefinite delay.

Uniroyal took full advantage of this opportunity, failing to file a response to plaintiffs' summary judgment motion for two years. (App. B-3) Moreover, as the district court later commented, "Although Uniroyal's violation of Title VII had been judicially determined, Uniroyal did nothing in the interim to provide relief for members of the plaintiffs' class." (App. B-4)

Uniroyal's delay tactics persisted throughout this litigation. In July of 1973, Judge Beamer criticized Uniroyal's "bad faith" in delaying its responses to plaintiffs' discovery requests, which caused prejudice to the plaintiffs. *See* Chrapliwy v. Uniroyal, Inc.,

> In October of 1974, Judge Beamer, who had been handling the case, died. His death and the resulting vacancy on the district court delayed further proceedings.
>
> Time was passing, and there was further delay. It appeared that defendant was taking advantage of the situation, and doing nothing to provide relief for members of the plaintiff class. Beginning in 1975, plaintiffs sought to obviate further delay in the Title VII action by attempting to persuade the federal government to notice defendant's discriminating practices which were the subject of the Title VII action and to take action against defendant based on such discrimination. (App. A-4) (citations omitted)

Finally, both the trial court and the appellate court found that plaintiffs' pursuit of the debarment remedy was undertaken pursuant to their responsibilities as class representatives to "initiat[e] whatever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal" [9] (App. A-5 quoting *Chrapliwy* v. *Uniroyal*,

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6 FEP Cases 98, 100 (N.D. Ind. 1973). The court expressly rejected the company's "weak explanation for delay" in responding to plaintiffs' discovery, and characterized the company's objections to plaintiffs' interrogatories as "groundless." *Id.* at 100. It also criticized "the inexcusable delays occasioned by defendant's actions," *id.* at 101, and found that Uniroyal's actions evidenced a "desire to create delay." *Id.* at 100. Consistent with its litigation strategy throughout, the company filed a motion to "alter" the court's July, 1973 order, which was denied. Chrapliwy v. Uniroyal, Inc., 7 FEP Cases 343, 344 (N.D. Ind. 1974).

[9] The district court held:

> By writing to the Federal agencies to inform them of discriminatory practices in violation of Executive Order No. 11246, and by seeking an order to compel the appropriate agencies to bring Uniroyal's alleged discriminatory employment practices into compliance with Executive Order No. 11246, *the plaintiffs' attorneys have attempted diligently to pursue*

Inc., 12 FEP Cases 1661, 1663 (N.D. Ind. 1976), and that plaintiffs' pursuit of the debarment remedy "directly contributed" to the successful settlement of the Title VII case in which the fees here at issue were sought. (App. A-5)

> In October of 1979, less than one week before the defendant was to lose a large federal contract as a result of the government's investigations of a violation of Executive Order 11246, the parties settled the Title VII action. The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near. (App. A-5) (citations omitted)

Under these unique circumstances, the award of attorney's fees for these decisive litigation activities was clearly warranted.

Uniroyal contends that an award of fees for plaintiffs' successful work to force a settlement of the Title VII case through pursuit of the debarment remedy is precluded by this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). This is plainly incorrect, and does not present an issue worthy of this Court's consideration.

The *Alyeska* decision has virtually no bearing on this case. *Alyeska* held that the award of attorney's fees to the prevailing party is normally not appropriate in the absence of explicit statutory authority. In this case

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a second available means of redress for their clients. Chrapliwy v. Uniroyal, Inc., 12 FEP Cases 1661, 1662 (N.D. Ind. 1976).

* * * *

As representatives of the class, they were charged with the responsibility of initiating whatever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal. *Id.* at 1663.

Section 706(k) of Title VII authorizes the award of reasonable attorney's fees, and this Court has emphasized that the policies of Title VII require that the prevailing Title VII plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417-18 (1978), quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

Carey is likewise no bar to the award of attorney's fees for the plaintiffs' pursuit of the debarment remedy, which proved to be determinative of the Title VII case in which the fees were awarded. The Seventh Circuit's decision analyzes the significant factual differences distinguishing this case from *Carey*, and thus indicating that *Carey* should not be read to preclude an award of fees here. (App. A-10-11) Uniroyal makes no attempt to challenge that analysis.

Equally important, to the extent that it applies here, *Carey* favors the award of fees for these determinative litigation efforts. As the Seventh Circuit stated:

> If *Carey* has any application to the particular question before us, it is in indicating that the statute should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court. The Supreme Court expressly recognized that a liberal view toward fees would further Congress' goal of "[making] it easier for a plaintiff of limited means to bring a meritorious suit." 447 U.S. at 63, quoting *Christiansburg Garment Co., supra*, 434 U.S. at 420. (App. A-12)

Ignoring the district court's ruling that plaintiffs' pursuit of the debarment remedy was undertaken pursuant to their obligation as Title VII class representatives to further the interests of the class,[10] Uniroyal contends

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[10] Pursuit of this avenue as a means for obtaining relief for the Title VII class was likewise required by the Code of Professional

that these activities cannot be compensated because they were not "mandated" by the Act. (Petn. at 9) In support of that claim, Uniroyal mistakenly argues that *Carey* establishes the outer limits of the district court's authority to award fees to prevailing Title VII plaintiffs under Section 706(k) and indicates that fees can "only" be awarded for work performed in state proceedings required to be invoked by Title VII. (Petn. at 9)

Carey neither requires nor countenances any such narrow interpretation of Section 706(k). To the contrary, *Carey* and the Court's other decisions interpreting Section 706(k) and related attorney's fee statutes evidence a clear intent to apply those provisions liberally in a manner that will encourage "private attorney[s] general" to step forward and vigorously enforce this important body of law. *See, e.g., Carey*, 447 U.S. at 63; *Christiansburg Garment Co.*, 434 U.S. at 416-17; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. at 401-402. As the Court has recognized, the purpose of such fee provisions is to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Christiansburg Garment Co.*, 434 U.S. at 420; *see also Carey*, 447 U.S. at 63.

In holding that attorney's fees earned in state administrative and judicial proceedings prior to federal suit were earned in "an action or proceeding" under Title VII, the Court in *Carey* did not purport to limit the permissible award of attorney's fees under Section 706(k) to hours expended in the pursuit of remedies "mandated" by Title VII. There is no suggestion in *Carey* that this Court was attempting to define the outer limits of the district courts' authority to award attorney's fees to

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Responsibility of the American Bar Association. Disciplinary Rule 7-101, (A)(1) of the Code provides as follows:

> *Representing a Client Zealously*
>
> A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law . . . .

prevailing Title VII plaintiffs, as Uniroyal presumes. Instead, *Carey* is simply illustrative of situations where the liberal policies of Title VII dictate that fees may be awarded. As the Court stated in *Carey*:

> *It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers this goal,* while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim. 447 U.S. at 63. (Emphasis added).

Indeed, the Court in *Carey* explicitly rejected an acknowledgedly plausible but more limited interpretation of Section 706(k) as contrary to the statutory policies, *see* 447 U.S. at 62, and it authorized an award of fees for litigation activities not "mandated" by Title VII, which requires only that plaintiffs invoke state remedies and wait sixty days before initiating a federal action, not that they exhaust their state remedies, as did the prevailing plaintiff in *Carey*.[11]

Uniroyal's restrictive interpretation of Section 706(k) is exactly the kind of rigid, mechanical analysis that this Court has repeatedly rejected. *See, e.g., Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 419. ("[T]he per-

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[11] As the Court recognized, Title VII does not require that a plaintiff *exhaust* state remedies before invoking the jurisdiction of the EEOC or the federal courts. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65, 66 n.6 (1980). The statute only requires that a complaint *invoke* state agency proceedings for a period of sixty days, and it does not require resort to any state judicial proceedings at all. In *Carey*, however, the plaintiff pursued both state administrative remedies and state court proceedings for a period of three years, and her counsel spent 51 of the total 82 hours devoted to the case in these proceedings. Thus, if Section 706(k) were construed to limit attorney fees to proceedings "mandated" by Title VII, the plaintiff in *Carey* would only be entitled to fees for the first 60 days in the state agency proceedings, not to her extended pursuit of the entire course of state agency action and judicial review.

missive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction."); *Carey*, 447 U.S. at 62 ("We find nothing ing the statute . . . to suggest that Congress intended to draw this particular line.")

The policies of Title VII are promoted by the award of fees for plaintiffs' decisive debarment litigation activity, which enabled the Title VII plaintiffs to obtain relief more expeditiously and economically in the unique circumstances of this case. Congress incorporated class action proceedings into Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971). As the Seventh Circuit recognized, all the work performed by plaintiffs and their attorneys following the certification of the Title VII class in this case, including their work leading to Uniroyal's debarment and the settlement of the Title VII case, was done in furtherance of their obligation to protect the interests of the Title VII plaintiff class fairly and adequately, and thus was part of the action and proceedings under Title VII within the meaning of Section 706(k). (App. A-5; A-12)[12] Similarly, Congress intended that Title VII be applied to enable plaintiffs to obtain prompt relief after defendant's liability is established. Thus, conciliation of violations is strongly favored, *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Carson* v. *American Brands, Inc.*, 450 U.S.

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[12] Uniroyal complains that it was not a party in some of the debarment litigation. This misses the point, however, since the court of appeals found that all of plaintiffs' activities to pursue the company's debarment were undertaken pursuant to their obligations as representatives of the VII Title class and in pursuit of their Title VII rights. (App. A-12) Under the circumstances of this case, the court of appeals' characterization of Uniroyal's contention as "irrelevant" was entirely correct. (App. A-13, n.15) The principle that prevailing plaintiffs should be compensated for reasonable and successful efforts to obtain Title VII relief is not limited to formal face-to-face confrontations between the Title VII plaintiff and defendant.

79 (1981), and the Act provides that Title VII actions are to be expedited "in every way." 42 U.S.C. § 2000e-5(f)(5). Here, the award of fees for the debarment litigation, which forced a just settlement of the Title VII case without a lengthy trial and appeal, serves all of those policies.

Finally, the Seventh Circuit's decision in this case does not represent "an entirely new standard" for Title VII fee awards (Petn. at 7), nor does it open the floodgates of needless litigation for the purpose of fee generation, as Uniroyal suggests. (Petn. at 10) To the contrary, the Seventh Circuit's decision recognizes the district court's responsibility in considering fee awards to ascertain "the number of hours reasonably expended to obtain relief in the action." (App. A-9, *citing Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), and *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981). The court of appeals also expressly acknowledges that a district court need not award fees for litigation activities if it determines that they were not reasonable. (App. A-8; A-10, n.12) Thus, the decision below is not a directive to district courts automatically to award fees for any and all activities that lead to the termination of a Title VII case, as Uniroyal contends. (Petn. at 10) It is instead a ruling that Section 706(k) authorizes, subject to the discretion of the district court, the award of fees for reasonable activities of the kind here at issue.

The Seventh Circuit's ruling is clearly correct. Petitioner points to no conflict among the circuits on the principle of law here at issue, or to any error in applying that principle in this case. Review by this Court is therefore not warranted.

B. The Court of Appeals Correctly Ruled That Prevailing Plaintiffs' Attorney's Fees Are To Be Based on Counsel's Normal Hourly Billing Rates. No Remand On That Issue Was Required in View of the Extensive Findings Made By the District Court and Relied on By the Court of Appeals.

Uniroyal contends that the court of appeals "rejected the District Court's findings of fact and substituted its own findings" in holding that plaintiffs' attorneys' normal hourly billing rates should be used in computing the fee award. (Petn. at 14) The company further claims that plaintiffs' attorneys' normal hourly billing rates were not shown by sufficient evidence. These complaints are unfounded.

Uniroyal's belated challenge to the hourly rates at which plaintiffs' attorney's fees are to be computed presents a question whether the court of appeals was required to remand this issue to the district court rather than resolve the question itself on the basis of the substantial evidence of record. This is not an issue warranting this Court's attention. The Seventh Circuit was plainly correct in relying on the district court's extensive findings of fact to resolve the issue. *Cf. Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 332-33 (1974).

Uniroyal's basic argument misinterprets the Seventh Circuit's ruling and seeks now to raise factual issues never presented to the district court, which, as the court of appeals noted, found that plaintiffs' attorneys' normal hourly billing rates were reasonable. (App. A-13) The normal billing rates of plaintiffs' counsel were shown by evidence of record, which was undisputed by defendant Uniroyal in the district court. Similarly, the company did not complain in the district court that plaintiffs were required to offer additional proof that their attorneys' normal billing rates had actually been charged to and collected from other clients, and it did not seek to make that an issue at that time. The sufficiency of

the evidence regarding the rates charged by counsel was unquestioned by or before the district court, and its finding of the reasonableness of these rates also was supported by the evidence, including evidence that Uniroyal itself hired comparably-priced counsel and relied on them extensively throughout this litigation. (*See* App. A-6; A-14; B-26; B-28)

Plaintiffs' verified Application for Attorney's Fees, filed May 16, 1980, gave the current billing rates of each of plaintiffs' attorneys and described each attorney's experience and qualifications. Thereafter, each party served interrogatories on the other, calling for each attorney's hourly billing rates. Uniroyal's interrogatories to plaintiffs requested each of their attorneys' "hourly billing rates for each type of client served or case in which work was performed" from 1972 through 1980. In response, plaintiffs' sworn answers showed that the current normal billing rates of the various attorneys who worked on prevailing plaintiffs' behalf ranged from $200 to $50 per hour. Those facts having been established, Uniroyal did not seek any additional discovery or substantiation by plaintiffs, nor did it challenge the accuracy or sufficiency of the evidence of plaintiffs' attorneys' normal billing rates before the district court.

Uniroyal now belatedly maintains that the district court was required to develop a factual record establishing that plaintiffs' lead counsel, Thomas R. Ewald, actually charged his rate of $175 per hour to other clients. (Petn. at 15) That issue was not raised in the district court and was invented for the first time on appeal. In any case, it is a non-issue. Plaintiffs' answers to Uniroyal's interrogatories implicitly indicate that the rates given are counsel's actual rates. Furthermore, it should be noted that the published decisions of the United States District Court for the Northern District of Indiana and of the Seventh Circuit demonstrate the extensive experience of plaintiffs' lead counsel in other litigation in the very court in which the fee award was sought.

See City of Mishawaka, Indiana v. *American Electric Power Co., Inc.*, 465 F.Supp. 1320 (N.D. Ind. 1979), *aff'd in part and vacated in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *City of Mishawaka, Indiana, et al.* v. *Indiana & Michigan Electrict Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). Thus, the hourly rate sought by plaintiffs' lead counsel was not an "out of town" rate, but rather the "local" rate this attorney has charged in other cases before the same district court, just as were the comparable rates Uniroyal paid its defense counsel from New York, Washington, and Chicago. (*See* App. A-13; B-26)

The district court's view that plaintiffs' attorneys' normal hourly billing rates were reasonable was fully supported by the evidence. Both sides litigated this complex Title VII case primarily through specialized attorneys from New York, Chicago, and Washington, D.C. rather than through local counsel from the South Bend area. The district court found that both sides of this litigation "engaged similarly skilled and expensive counsel to represent [their] interests in this suit." (App. B-26) As that court noted,

> [Uniroyal employed] four major, nationally recognized, law firms, and forty-five attorneys in its spirited defense, for a total of 10,963 hours billed through July 22, 1980. Uniroyal had its own $175 and $200 per hour attorneys, as well as $75 and $100 per hour attorneys, according to the 1980 billing rates. Presumably, these fees were received on a regular basis, without risk of nonpayment. *Id.* (footnote omitted.)[13]

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[13] Of Uniroyal's 45 defense counsel, 37 were from New York, Chicago or Washington. These attorneys worked more than 80% of the hours devoted to the defense of the case, and they collected more than 80% of the fees spent by Uniroyal. *See* Joint Appendix filed in the United States Court of Appeals for the Seventh Circuit at 571. In all, the company's defense counsel were paid the equivalent of $1,309,591.60 at their current billing rates.

As the district court also found,

> The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. (App. B-27)

Finally, the court found that the number of hours devoted to the case by plaintiffs' and defendant Uniroyal's attorneys were approximately the same—11,743 hours for plaintiffs and 10,963 for Uniroyal. (*See* App. B-26 and B-33)

Uniroyal mistakenly contends that the Seventh Circuit substituted its own factual findings for those of the district court. To the contrary, after correcting the district court's erroneous conclusion of law that Title VII required it to "balance" the normal billing rates of plaintiffs' counsel against those charged by local attorneys in the community, (*see* App. A-14) the court of appeals relied on the extensive findings and discussion of the district court to determine that the normal hourly rates of plaintiffs' counsel were reasonable. As the court of appeals stated:

> In our case, the district court did not question the reasonableness of the hourly rates requested by the plaintiffs. The court recognized that the defendant availed itself of counsel charging rates comparable to the rates requested by the plaintiffs. The court did not indicate skepticism over the need for out of town counsel. In fact, the court recognized that Congress intended to encourage plaintiffs to employ counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendant would most likely assert. (App. A-14-15) (footnotes omitted)

Although recognizing considerations that might justify rejection of an out-of-town counsel's rate as the reason-

able rate for the purpose of Section 706(k), (see App. A-14-16) the Seventh Circuit determined that there was "no suggestion that the district court would have answered either of these questions adversely to plaintiffs." (App. A-16)[14] Accordingly, the Seventh Circuit chose to rely on the findings below in establishing the reasonable hourly rate for plaintiffs' counsel rather than prolong this ten year litigation even further by requiring additional consideration of an issue whose outcome had been determined.

Nothing in this Court's recent decision in *Pullman-Standard Co.* v. *Swint*, 50 U.S.L.W. 4425 (S.Ct. April 27, 1982), suggests that the court of appeals erred. Unlike *Swint*, in this case the Seventh Circuit did not reverse the district court's findings of fact and make its own contrary findings. This case, therefore, does not present a violation of Rule 52 of the Federal Rules of Federal Procedure, as did *Swint*.

Moreover, the Court recognized in *Swint* that the normal rule favoring remand for further factual find-

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[14] The Seventh Circuit's judgment on this point is unassailable. As noted previously, the district court had found that both sides in this litigation retained and extensively relied on "similarly skilled and expensive counsel" (App. B-26) and that the calibre of counsel was "equally matched." (App. B-27) The district court additionally had recognized that "[i]t would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys" (App. B-27-28) and noted that "[i]f Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting petitioners to the local billing rate." (App. B-28) Finally, the district court acknowledged that any such litigation would not be consonant with the "national" nature of complex litigation of this kind:

> "The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale." (App. B-28)

ings does not apply where the record permits only one resolution of the issue. *See* 50 U.S.L.W. at 4430, *citing Kelley* v. *Southern Pacific Co.*, 419 U.S. at 331-32. This is just such a case, since all the appellate court had to do in this instance was to apply district court's findings of fact after correcting the erroneous legal conclusion that had prevented the district court from applying those findings itself.[15]

In summary, the court of appeals was plainly correct in determining that the record was adequate to enable it to establish the appropriate rates for the award of fees to counsel for the prevailing Title VII plaintiffs and that the district court would have resolved the question the same way had it not mistakenly concluded that applicable legal standards required some other approach. In any event, this fact-specific issue does not warrant this Court's plenary consideration.[16]

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[15] Uniroyal contends that the court of appeals "totally ignored local billing rates and made its own independent findings of fact that the requested out-of-town rate should be allowed." (Petn. at 16) This is erroneous, since both the trial court and the appellate court put great weight on the fact that the "local rates" for Uniroyal's out-of-town counsel were similar to those of plaintiffs' counsel. (*See* App. B-26; B-28; A-6; A-14)

[16] Uniroyal invites the Court to take this case in order to eliminate allegedly inconsistent attorney's fee rulings emanating from the district courts. (Petn. at 18) The short answer to this plea is that the question presented by petitioner does not afford an appropriate vehicle for such an effort. Equally important, however, there is no indication that such broad guidance is necessary. Examination of the various appellate decisions establishing the basic approach for ruling on fee award requests cited by the Seventh Circuit (*see* App. A-5, n.5) and the more recent decisions cited in Uniroyal's Petition reveals a general consensus as to the basic parameters of the district court's inquiry. The decision in this case is entirely consistent with this basic approach. In view of the discretionary nature of the fee award rulings and the highly fact-specific context in which they are to be made, it is inevitable that some district court decisions may appear to be inconsistent. How-

CONCLUSION

For the reasons set forth herein, Uniroyal's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied, and this ten-year litigation be allowed to draw to a close.

Respectfully submitted,

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ever, there is no suggestion that the appellate courts are not dealing with any such disparities effectively and in a consistent manner, or that this Court's endorsement of the general standards developing in the courts of appeals is required.